to an action in trover follow the earlier English rule[26] as to damages and hold the measure thereof to be the difference between the value of the goods converted and the debt.[27] Conversely, the pledgor when sued for the debt may set off the value of the pledge.[28] Although on principle it is anomalous to allow a recovery in trover for anything less than the value of the goods converted,[29] yet as the action in substance sounds in contract[30] the courts apply the contract rule and allow recoupment as for claims growing out of the same transaction;[31] a rule convenient in practice. The same reasons apparently urge its adoption when a chattel mortgagee is sued for conversion.[32] This rule, therefore, seems properly to have been applied in the principal case.

TENDER NECESSARY TO DISCHARGE A MORTGAGE LIEN.—At common law, payment or tender of payment by the pledgor, either at the day conditioned, or later, was sufficient to discharge the lien on the goods, provided the tender was refused.[1] In the case of a mortgage, the tender at the day, if refused, was a sufficient discharge, for it was a performance of the condition and the condition being complied with the lien was gone.[2] After the day, however, neither tender nor payment had any effect, the title, by the non-performance at maturity, being absolutely vested in the mortgagee.[3] This distinction is largely based on the essential differences in the nature of a pledge and a mortgage. In the former, the title was at all times in the pledgor. The pledgee had possession simply, coupled sometimes with the power to sell.[4] In the latter, a mortgagor had only a right to redeem, the legal title being in the mortgagee, subject to divestment upon the performance of the condition. The modern tendency, however, has been to consider a mortgage, not so much a vested estate to be defeated on a contingency, but rather a mere security for the primary obligation, the debt. This view in effect prevails in most of the states of this country. The result is great confusion as to the effect of a tender after the law day.

Of course, where the common law theory still obtains neither tender nor payment after the day of maturity is of any avail, the time for the performance having past, the mortgagor's only remedy

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[26]Johnson *v.* Stear (1863) 15 C. B. (N. S.) 330.

[27]Neiler *v.* Kelley *supra.*

[28]Stearns *v.* Marsh (N. Y. 1847) 4 Denio 227; Richardson *v.* Ashby (1895) 132 Mo. 238.

[29]Pollock, Torts (8 ed.) 358.

[30]Johnson *v.* Stear *supra.*

[31]Bulkeley *v.* Welch (1863) 31 Conn. 339.

[32]Iler *v.* Baker *supra.*

[1]Comyn's Dig. Tit. Mort. B.; Mitchell *v.* Roberts (1883) 17 Fed. 776; Coggs *v.* Bernard (1703) 2 Ld. Raymond 909, 917; Ball *v.* Stanley (Tenn. 1833) 5 Yerg. 199.

[2]Erskine *v.* Townsend (1807) 2 Mass. 493; Merrill *v.* Chase (Mass. 1862) 3 Allen 339.

[3]Phelps *v.* Sage (Conn. 1805) 2 Day 151; Currier *v.* Gale (Mass. 1865) 9 Allen 522.

[4]Franklin *v.* Neate (1844) 13 M. & W. 481.

is for a bill in equity to redeem.[5] Where, however, the mortgagee, though retaining the legal title, retains it merely as security for the debt owing, payment after maturity operates as a discharge of the debt and with it a discharge of the lien or security,[6] for the debt itself being discharged, all things accessorial, vanish with it. Such payment need not be in money, but anything which will discharge the debt will destroy the lien,[7] though there are exceptions in the cases of the statute of limitations[8] and of a discharge in bankruptcy.[9] The same rule, however, does not apply where a tender is made after the day of condition, for the legal title in the mortgagee cannot be divested by a mere tender unless the money is actually paid into court,[10] either at the time of making the tender or before such defense is interposed.[11] A third view is taken in New York and a few other jurisdictions, where the old common law mortgage has undergone a complete change: the mortgagee has not the legal title, and the mortgage is nothing more than a security for the debt. In this case, the courts have logically followed the analogy of a pledge,[12] and hold that a mere tender, even where the money has not been deposited in court, after default, is sufficient to destroy the lien, although, of course, the debt itself remains.[13] In all of these jurisdictions the rules adopted are logical and accurate results of the mortgage theory recognized. Several states, however, have adopted rules not logically consistent with their own interpretation of a mortgage. So Minnesota, where a real property mortgage is held to be merely security for the debt, the title being in the mortgagor, has adopted the New York view, not only in real, but also in chattel mortgages,[14] although in the latter case the title is held by the mortgagee. New York has escaped this error, and has in the case of chattel mortgages, since the title is in the mortgagee, adopted the second view noted above.[15] In California, on the contrary, the view has been taken that a tender after the day does not destroy the lien, even though a California mortgage appears to be little more than a pledge, the title being in the mortgagor.[16]

Obviously, the doctrine expressed by the New York courts, if at all extended, would accomplish harsh results, and it has, therefore,

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[5]Erskine *v.* Townsend *supra;* Merrill *v.* Chase *supra.*

[6]Shields *v.* Lozear (1869) 34 N. J. L. 496, 502; Swett *v.* Horn (1818) 1 N. H. 332; Packer *v.* Beasley (1896) 116 N. C. 1.

[7]Sherman *v.* Sherman (1852) 3 Ind. 337.

[8]Miller *v.* Helm (Miss. 1843) 2 S. & M. 687, 697; Thayer *v.* Mann (Mass. 1837) 19 Pick. 535.

[9]Chamberlain *v.* Meeder (1844) 16 N. H. 381; Bush *v.* Cooper (1853) 26 Miss. 599.

[10]Shields *v.* Lozear *supra;* Crain *v.* McGoon (1877) 86 Ill. 431; Rowell *v.* Mitchell (1876) 68 Me. 21.

[11]Whittaker *v.* Belvidere Co. (1897) 55 N. J. Eq. 674.

[12]Loughborough *v.* McMevin (1887) 74 Cal. 250; Mitchell *v.* Roberts *supra.*

[13]Kortright *v.* Cady (1860) 21 N. Y. 343; Swett *v.* Horn, *supra;* Van Husan *v.* Kanouse (1865) 13 Mich. 303; see Bartell *v.* Nicholls (1877) 6 Ore. 321.

[14]Moore *v.* Norman (1890) 43 Minn. 428.

[15]Noyes *v.* Wyckoff (N. Y. 1883) 30 Hun 466.

[16]Perre *v.* Castro (1860) 14 Cal. 519; Himmelmann *v.* Fitzpatrick (1875) 50 Cal. 650.

been narrowed and modified by later decisions, which require that the tender be of the whole amount including principal, interest, and costs,[18] unless, indeed, the payment of a lesser sum has been agreed upon; that it must be absolute, in good faith, and that the holder of the mortgage is entitled to a reasonable time to ascertain the amount.[19] Further, the mortgagor may by his actions, waive the rights which he has acquired by a previous tender.[20] Such tender will not cut off subsequently accruing interest,[21] and apparently the purchaser of the equity of redemption must bring his money into court before he can set up his tender.[22] A late tender cannot be made the basis of affirmative relief by the one making the tender, on the ground that he who would get equity must do equity.[23]

In a recent case, *Murray* v. *O'Brien* (Wash. 1909) 105 Pac. 840, the question of the sufficiency of tender was involved. The court in general accepted the New York position, but refused relief on the grounds first, that the time of tender lasted only to the time of bringing suit and not to the time of sale, second, that affirmative relief was sought, and, third, (in a separate opinion) that such relief would allow a pure tender to destroy not only the security for the debt, but the debt itself; as the debt had become unenforceable. In regard to the time in which a tender could be made the court directly overruled an earlier case,[24] and no reason would logically appear why, if the New York theory be adopted, a tender after suit should be less effective than one before. On the question of affirmative relief the decision is undoubtedly correct. As regards the third point it would appear that since a tender, even in a pledge, does not destroy the debt itself,[25] but only the lien or security, if a case is shown where the destruction of the lien would *ipso facto* destroy the debt, or where the security alone is enforceable the debt having been lost, or merged therein, this fact should be considered. It has been so held and actual payment required.[26]. Such a rule would sufficiently limit the New York doctrine and remove most of its possibly objectionable features.

VESTING OF LEGACIES BY PRESENT GIFTS OF INCOME.—In a recent English case, *Mason* v. *Mason* (1910) 101 L. T. 669, the testator devised the income of certain funds to his daughter, till marriage, and the court held that by force of such a gift, she was entitled to the funds from which the income was derived as well as the income itself. The implication of a gift of the *corpus* undoubtedly arises under such circumstances from the fact, that, since the person entitled to the income is generally the one who holds the principal, such, in the particular case, was the intent of the testator in making the be-

[17]Graham *v.* Linder (1872) 50 N. Y. 547.

[18]Thornton *v.* Nat. Exch. Bank (1879) 71 Mo. 221.

[19]Potts *v.* Plaisted (1874) 30 Mich. 149.

[20]Fry *v.* Russell (1876) 35 Mich. 229.

[21]Nelson *v.* Loder (1892) 132 N. Y. 288.

[22]Harris *v.* Jex (N. Y. 1873) 66 Barb. 32.

[23]Tuthill *v.* Morris (1880) 81 N. Y. 94; Weiner *v.* Tuck (1891) 127 N. Y. 217.

[24]Thomas *v.* Seattle B. & M. Co. (1908) 48 Wash. 560.

[25]Tuthill *v.* Morris *supra.*

[26]Harris *v.* Jex *supra.*